

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

In Re  
AMERICANWEST BANCORPORATION,  
  
DEBTOR.

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CAPPELLO CAPITAL CORP.,  
  
Plaintiff,  
  
AMERICANWEST BANK, et al.,  
  
Defendants.

NO. CV-11-0449-LRS

CASE NO. 10-6097-PCW11

(Adv. Proc. No. 11-80323-PCW)

**ORDER ADOPTING REPORT  
AND RECOMMENDATION RE MOTON  
FOR ATTORNEYS' FEES**

Pursuant to the District Court's Order Referring AmericanWest Bank's Motion for Award of Attorney's Fees for Report and Recommendation entered on March 29, 2013 (DC Case No. 11-CV-0449-LRS, ECF No. 58), the Bankruptcy Court entered a Report and Recommendation Re: AmericanWest Bank's Motion For Attorney's Fees on June 17, 2013 (ECF No. 256), recommending AmericanWest Bank's Motion for Award of Attorney's Fees be granted in part and denied in part. Adversary No. 11-80323-PCW, Dkt. 286. Both Cappello Capital Corp. ("Cappello") and AmericanWest Bank ("the Bank") filed objections to the Bankruptcy Court's Report and Recommendation Re Attorney's Fees. The Court's analysis follows.

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1 what Cappello argues, that language has no connection to the general  
2 attorney fee provision found in the Engagement Agreement.

3 The Court rejects Cappello's arguments for the same reasons set  
4 forth in the Bankruptcy Court's Report and Recommendation. Cappello's  
5 argument ignores the plain language of the attorney fee provision in  
6 the contract. Cappello attempts to import a limitation into the attorney  
7 fee provision from an entirely separate portion of the contract, which  
8 is not proper contract interpretation and fails as a matter of law. This  
9 Court finds, as the Bankruptcy Court did, that there is no ambiguity in  
10 the contract. If a dispute arises between the parties to the contract,  
11 the prevailing party is entitled to its attorney's fees without a cap as  
12 Cappello advocates. Therefore, this objection is overruled.

13 **2. The Bankruptcy Court Erred by Concluding That The Bank Was A**  
14 **Prevailing Party, Even Though Neither the Bank nor Cappello Won**  
**on Their Own Affirmative Claims Against Each Other.**

15 Cappello argues that there was no prevailing party. Cappello  
16 supports its theory by arguing that the Bank formally dropped its  
17 affirmative compulsory counterclaims on April 8, 2013. Therefore, while  
18 Cappello did not win on Cappello's own claims, the Bank similarly did not  
19 win on the Bank's own claims. In that event, neither party is the  
20 prevailing party urges Cappello.

21 The Court finds Cappello's argument unconvincing. In order to  
22 determine who has prevailed, for the purposes of awarding costs, the  
23 trial court must look at the lawsuit as a whole to determine which party  
24 was the "winner" and which the "loser." *Landis v. Hannaford Bros. Co.*,  
25 754 A.2d 958 (Me. 2000). Clearly, the Bank obtained an unequivocal win  
26 and dismissal of the case on summary judgment. This Court interprets

1 "prevailing" party or "successful" party as one who prevails in a  
2 "significant" respect in the litigation. The Bank's voluntarily  
3 dismissed counterclaims, that Cappello wrongly relies upon to undermine  
4 the Bank's prevailing party status, were merely defensive claims and as  
5 such, certainly do not result in the Bank being deemed a "loser" in this  
6 lawsuit. The Court agrees with the Bankruptcy Court's analysis regarding  
7 this objection. The Court concludes that the Bank is indeed a prevailing  
8 party in the instant litigation.

9 **3. The Bankruptcy Court Erred By Using Hourly Rates That Exceed**  
10 **Customary Rates in the Eastern District of Washington for**  
11 **Similar Work.**

12 Cappello argues that the standard regarding the hourly rate to be  
13 applied when determining reasonable attorneys' fees to be paid by an  
14 opposing party is absolutely clear: the rates should be "those prevailing  
15 in the community for similar services by lawyers of reasonably comparable  
16 skill, experience and reputation." *Camacho v. Bridgeport Fin., Inc.*, 523  
17 F.3d 973, 980 (9th Cir. 2008).

18 Cappello further asserts that the Bankruptcy Court at first  
19 recognized this standard, asking the parties to supplement the record  
20 with evidence of appropriate Spokane rates, but in its Recommendation,  
21 departed from this standard granting the Bank full hourly rates charged  
22 by its counsel which were much higher than Spokane rates. Cappello  
23 concludes that the Bankruptcy Court erred by basing its decision on the  
24 fact that the case originated in California and was then transferred to  
25 Washington by the Bank.  
26

1 Defendant AmericanWest Bank asserts that the Bankruptcy Court was  
2 correct in its analysis.

3 The Court, too, wholeheartedly agrees with the Bankruptcy Court's  
4 analysis regarding this objection. As the Bankruptcy Court correctly  
5 observed:

6  
7 The California statute and the contract between the  
8 parties both allow "reasonable" attorney's fees. The  
9 question of reasonableness has various components,  
10 including the reasonableness of the hourly rate,  
11 amount of hours, and quality of service.

12 ...  
13 The present controversy does not involve a statutory  
14 award of attorney's fees, but rather is a private  
15 contract dispute between two very financially  
16 sophisticated parties, each of which selected  
17 counsel and agreed to pay certain hourly rates for  
18 the legal services. Those hourly rates are  
19 comparable. Although the court exercises its  
20 discretion, under such circumstances, some weight  
21 should be given to the parties' decision to employ  
22 counsel at a particular hourly rate.

23 The hourly rate requested is reasonable. Any  
24 justification to require local rates be applied does  
25 not appear relevant to this controversy. This case  
26 was commenced in a state court in Los Angeles,  
California. AWB promptly removed the case to the  
federal District Court sitting in Los Angeles,  
California, and at that time, apparently had the  
goal of litigating the dispute in this court.  
Certainly at that point in the litigation, it was  
uncertain whether venue would be in a state court or  
a federal district court or a bankruptcy court. It  
was uncertain whether the litigation would proceed  
in Los Angeles, California, or Spokane, Washington.  
The determination of proper venue was a lengthy and  
hard fought battle. Even assuming local rates would  
ordinarily apply to this case, it would be unfair,  
inefficient, and unwise to limit either party to  
local rates under such circumstances.

Report and Recommendation at 8, 11-12 (Dkt. 286).

1 An examination of the procedural history is helpful. In an apparent  
2 attempt to avoid litigation in the Bankruptcy Court in the Eastern  
3 District of Washington, Cappello filed this action in the Superior Court  
4 of the State of California for the County of Los Angeles on February 2,  
5 2011. The Bank removed the case to the United States District Court for  
6 the Central District of California on March 3, 2011. Cappello filed a  
7 motion to remand to the California state court, which was denied. The  
8 Bank asked the Central District of California court to transfer the case  
9 to the United States District Court for the Eastern District of  
10 Washington, with its ultimate destination to be the Eastern District of  
11 Washington Bankruptcy Court, where the bankruptcy was pending. Cappello  
12 vigorously objected to the transfer, but the Bank prevailed, and the case  
13 was transferred to the Eastern District of Washington by order entered  
14 July 28, 2011. After transfer to the District Court for Eastern District  
15 of Washington, the district court on August 22, 2011, transferred and  
16 remanded the case to the Bankruptcy Court. It is also noted that  
17 Cappello sued Sandler along with the Bank. Sandler had to retain  
18 counsel, a law firm in Los Angeles, California, to join in the venue  
19 dispute and defend itself in the common lawsuit. The Bank was obligated  
20 to indemnify Sandler for the fees Sandler incurred in its successful  
21 defense of the \$11.4 million claim against it. Although the Bank sought  
22 an award of the fees and costs it was required to pay for Sandler's  
23 defense (in the amount of \$1,183,816.45), the Bankruptcy Court rejected  
24 the Bank's claim. The Court finds that Cappello's objection is without

1 merit regarding the use of non-Spokane hourly rates used in determining  
2 the award for this highly litigious matter.

3 **4. The Bankruptcy Court Erred by Failing to Reduce the Hours Set**  
4 **Forth in the Invoices Despite Block Billing.**

5 Next Cappello argues that in fee applications, courts greatly  
6 disapprove of requests supported by block billing because block billing  
7 makes it difficult, if not impossible, for a court to assess the extent  
8 to which hours were reasonably billed. Cappello asserts that the Bank  
9 has not met its burden of proving the reasonableness of its hours.  
10 Cappello then argues that the Bankruptcy Court went as far as agreeing  
11 that the block billing method prevented an accurate calculation of the  
12 fees to be excluded, yet failed to make any reduction for block billing.  
13 Cappello concludes the Bankruptcy Court should have reduced, by at least  
14 20%, all hours for which the Bank submitted block-billing support.

15 The Bank explains that the subject invoices contained detailed  
16 descriptions of every task performed by each billing professional every  
17 day. Additionally, the Bank points out, the invoices did not allocate  
18 tenths of an hour to each task. The invoices were reviewed by the Bank's  
19 General Counsel, with some being adjusted based on discussions between  
20 General Counsel and the firm's billing partner, and the invoices were  
21 paid.

22 This Court finds that the Bankruptcy Court's analysis of the block  
23 billing that occurred is correct and did take into consideration  
24 Cappello's arguments. The Bankruptcy Court aptly stated:  
25  
26

1 The fact that block billing occurred does not  
2 prevent a conclusion that the fees requested are  
3 reasonable and no across-the-board percentage  
4 reduction should occur. Reductions in the amount  
5 requested for specific services are noted herein and  
6 arise not from the fact of block billing, but from  
7 a lack of entitlement to the fees.

8 Report and Recommendation at 22 (Dkt. 286).

9 The Court finds that Cappello's objection is without merit regarding  
10 the block billing invoices, which contained sufficient detail for the  
11 opposing party and the Bankruptcy Court to determine the reasonableness  
12 of the fees being charged.

13 **B. The Bank's Objections**

14 **1. The Bankruptcy Court Improperly Found Against Awarding Sandler**  
15 **Fees that the Bank Had to Pay.**

16 The Bank objects to the Bankruptcy Court's rejection of its request  
17 to be awarded the fees incurred by Sandler O'Neill & Partners  
18 ("Sandler"), which the Bank was required to pay. In the Report and  
19 Recommendations, the Bankruptcy Court categorically disallowed the  
20 Sandler fees and costs, in the amount of \$1,183,816.45, as of the date  
21 of the motion for attorney's fees. The Bank complains that Cappello  
22 certainly knew that it would be forced to pay for Sandler's defense. The  
23 Bank further argues that Cappello's claim against Sandler was bogus.  
24 Cappello had no viable claim against Sandler, and that was the conclusion  
25 of the Bankruptcy Court on summary judgment (a conclusion accepted by the  
26 District Court). Report & Recommendation Re Summary Judgment at 17-24  
(Dkt. 233). The Bank argues that Cappello greatly increased the cost of



1 the litigation by suing Sandler and these defense costs are contemplated  
2 by the Attorneys Fee Provision, and should be part of the award.

3 More specifically, the Bank argues that the fees incurred for  
4 Sandler's defense constitute a part of "all reasonable attorney's fees  
5 . . . of the prevailing party . . . " or, in the alternative, "related  
6 expenses" in the "legal dispute between the Company [i.e., the Bank] and  
7 the Advisor [i.e., Cappello]," for which Cappello is obligated to  
8 reimburse the Bank.

9 Cappello responds that the Bankruptcy Court correctly determined  
10 that attorneys' fees incurred by Sandler could not be recovered by the  
11 Bank. Cappello asserts that the attorneys' fees provision in the  
12 Engagement Agreement between Cappello and the Bank does not provide for  
13 recovery of attorneys' fees or expenses incurred by any prevailing party  
14 other than the parties to the Engagement Agreement. Cappello quotes the  
15 provision from the Engagement Letter it argues is applicable:

16 In the event of any legal dispute between the [Bank  
17 or its then-holding company, AmericanWest  
18 Bancorporation] and [Cappello], all reasonable  
19 attorney's fees and related expenses of the  
20 prevailing party shall be paid by the other party  
(which shall include an award of interest at 10% per  
annum and recovery of costs by the prevailing  
party).

21 Engagement Agreement at 8 (ECF No. 68-Exh. A).

22 The Court reluctantly agrees with Cappello and the Bankruptcy Court  
23 on this issue because Sandler does not have a contract with Cappello.  
24 Cappello's lengthy and failed two state multicourt litigation strategy  
25 clearly caused the Bank to incur fees paid on Sandler's behalf.

1 Reasonable minds could conclude that this was intended by Cappello to  
2 force the Bank to settle with Cappello. While equitable fairness would  
3 support an award of the Sandler fees to the Bank, the facts and the law  
4 do not permit this court to reach that result. The Bank's objection is  
5 overruled and the Bankruptcy Court's recommendation is found to be  
6 legally correct.

7 **2. The Bankruptcy Court Improperly Found Against Awarding**  
8 **SKBHC/Starbuck's Fees that the Bank Had to Pay.**

9 The Bank's second objection is essentially the same as its first  
10 objection, except with respect to different parties. The Bank complains  
11 that in the Report and Recommendations, the Bankruptcy Court  
12 categorically disallowed the SKBHB/Starbuck fees and costs, in the amount  
13 of \$388,601.80. Report and Recommendation at 30 (Dkt. 286). In this  
14 objection, the Bank says that Cappello should have to pay for the legal  
15 fees and expenses of third parties SKBHC and Starbuck. For the same  
16 reasoning with respect to the Sandler fees, this Court finds the  
17 Bankruptcy Court's conclusion is adopted as Cappello had no contract with  
18 SKBHC and Starbuck. The contractual provision that the Bank relies upon  
19 does not provide that either Cappello or the Bank would be entitled to  
20 reimbursement for fees and related expenses incurred by a third party,  
21 but paid by Cappello or the Bank.

22 **3. The Bankruptcy Court Improperly Calculated Interest Accrual**

23 The Bank argues that as drafted by Cappello, the Attorney Fee  
24 Provision provided that the prevailing party's fee award "shall include  
25 an award of interest at 10% per annum." The Bank contends that interest  
26

1 accrues from the date of payment of each fees or costs invoice. This is  
2 the methodology used by the Bank in making its calculation of interest  
3 due.

4 Cappello agrees with the Bankruptcy Court's conclusion that the  
5 Engagement Agreement does not provide for prejudgment interest. More  
6 specifically, Cappello argues that the Attorney Fee Provision language  
7 means that interest should run from the date of the "award." Further,  
8 Cappello asserts, until a final judgment is issued as to the amount of  
9 fees to be paid, there is no award, or "final judgment or decision," as  
10 properly contemplated by the Bankruptcy Court.

11 The Court finds the Bankruptcy Court's determination on the issue  
12 of interest accrual is logical and correct. The Bankruptcy Court states,  
13 in pertinent part:

14 "Cappello's duty to pay [the Bank's] attorney's fees  
15 in this dispute rests upon a finding that [the Bank]  
16 is the prevailing party in the dispute. The duty  
17 also rests upon a finding as to the reasonable  
18 amount of the fees. Until those findings are made,  
19 no duty arises. The liability is unliquidated. In  
20 other words, the fees and costs must be "awarded."  
21 Report and Recommendation at 18 (Dkt. 286).

22 The Court finds that the Bank is not entitled to interest requested in  
23 the amount of \$300,104,58, as a final award had not been issued at the  
24 time of the Bank's request. Therefore, the Court overrules the Bank's  
25 objection relating to prejudgment interest.

#### 26 CONCLUSION

27 The objections made by both parties are rejected for the reasons  
28 above and for the reasons set forth in the Bankruptcy Court's Report

1 and Recommendation. Therefore, the court fully **ADOPTS** the Report and  
2 Recommendation Re: AmericanWest Bank's Motion For Award of Attorney's  
3 Fees (Dkt. 286). Accordingly,

4 **IT IS ORDERED** that:

5 1. Defendant AmericanWest Bank's Motion for Award of Attorney's  
6 Fees, **ECF No. 39**, are **GRANTED in part and DENIED in part**. The final  
7 award will be issued following a review of the Bank's anticipated  
8 petition for supplemental fees referenced in ECF 70.

9 2. Defendant AmericanWest Bank's Motion For Leave to File Excess  
10 Pages, **ECF No. 62**, is **GRANTED**.

11 **DATED** this 4th day of October, 2013.

12 ***s/Lonny R. Suko***

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14 LONNY R. SUKO  
15 United States District Judge  
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